

regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense. Particular deference should be accorded that "old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." *United States v. Mine Workers*, 330 U. S. 268, 272, where the rights and privileges find their origin in the Constitution. Far from manifesting such an unequivocal determination, the legislative history of the Federal Employers Liability Act indicates that Congress did not even consider the possible impact of its legislation upon state immunity from suits. The expressed purpose of the Act was "to change the common-law liability of employers." Certain specific defenses available to a railroad employer in an employee's personal injury suit were removed, but sovereign immunity was not one of them. To require Alabama's immunity defense to yield because of a claimed inconsistency with language of the Act making its provisions applicable to "every common carrier by railroad while engaging in commerce" relegates the States' constitutional immunity, not even mentioned in the Act, to the level of state statutory or common law defenses, four of which the Statute expressly proscribed. A decent respect for the normally preferred position of constitutional rights dictates that if Congress decides to exercise its power to condition privileges within its control on the forfeiture of constitutional rights its intention to do so should appear with unmistakable clarity.

In previous opinions the Court has indicated that waiver of sovereign immunity will be found only where stated by "the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction." *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 171. See *Ford Motor Co. v. Department of Treasury*, 323 U. S. 450, 468-470. If the automatic consequence of state operation of a railroad in interstate commerce is to be waiver of sovereign immunity, Congress' failure to bring home to the State the precise nature of its option makes impossible the "intentional relinquishment or abandonment of a known right or privilege" which must be shown before constitutional rights may be taken to have been waived. *Johnson v. Zerbat*, 304 U. S. 458, 464; *Fay v. Noia*, 372 U. S. 391. The majority in effect holds that with regard to sovereign immunity, waiver of a constitutional privilege need be neither knowing nor intelligent.*

* H. R. Rep. No. 1386, 60th Cong., 1st Sess., 1 (1908). In debate on the House floor Representative Henry also summarized the Act as having "changed four rules of the common law." 42 Cong. Rec. 4427.

* *Petty v. Tennessee-Missouri Bridge Comm'n.*, 359 U. S. 275; *California v. Taylor*, 353 U. S. 553, and *United States v. California*, 207 U. S. 178, are all inapposite. In *Petty* there was an express waiver, the compact itself expressly declaring that the bi-state authority could "sue and be sued." *Taylor* was not a suit against a State but against the members of the National Railroad Adjustment Board requiring them to take action on the plaintiffs' claims under the Railway Labor Act. Though the Court held the Act applicable to the

Preferring to leave the limiting of constitutional defenses to that body empowered to impose such conditions, I respectfully dissent.

State Belt Railroad it expressly disclaimed deciding any sovereign immunity issue. Footnote 16 of that opinion states: "The contention of the State that the Eleventh Amendment to the Constitution of the United States would bar an employee of the Belt Railroad from enforcing an award by the National Railroad Adjustment Board in a suit against the State in a United States District Court under § 3, First (p), of the Act is not before us under the facts of this case." 353 U. S., at 568. And the suit to recover the statutory penalty for violation of the federal Safety Appliance Act in *United States v. California* was brought by the United States, against whom it has long been recognized there is no state sovereign immunity. *United States v. Texas*, 143 U. S. 621.

AL. G. RIVES, Birmingham, Ala. (TIMOTHY M. CONWAY, JR., and RIVES, PETERSON, PETTUS & CONWAY, with him on the brief) for petitioners; WILLIS C. DARBY, JR., Mobile, Ala. (RICHMOND M. FLOWERS, Alabama Attorney General, with him on the brief) for respondents.

No. 368.—OCTOBER TERM, 1963.

Angelika L. Schneider,

Appellant,

v.

Dean Rusk, individually
and as Secretary of State.

On Appeal From the United
States District Court for
the District of Columbia.

(May 18, 1964.)

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Immigration and Nationality Act of 1952, 66 Stat. 163, 209, 8 U. S. C. §§ 1101, 1484, provides by § 352:

"(a) A person who has become a national by naturalization shall lose his nationality by—

"(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act . . ." (Italics added.)

Appellant, a German national by birth, came to this country with her parents when a small child, acquired derivative American citizenship at the age of 18 through her mother, and, after graduating from Smith College, went abroad for postgraduate work. In 1956 while in France she became engaged to a German national, returned here briefly, and departed for Germany, where she married and where she has resided ever since. Since her marriage she has returned to this country on two occasions for

* The exceptions relate, inter alia, to motions filed in the employment of the United States and are not relevant here.

visits. Her husband is a lawyer in Cologne where appellant has been living. Two of her four sons, born in Germany, are dual nationals, having acquired American citizenship under § 201(a)(7) of the 1952 Act. The American citizenship of the other two turns on this case. In 1959 the United States denied her a passport, the State Department certifying that she had lost her American citizenship under § 352(a)(1), quoted above. Appellant sued for a declaratory judgment that she still is an American citizen. The District Court held against her, 218 F. Supp. 302, and the case is here on appeal. 375 U.S. 822.

The Solicitor General makes his case along the following lines.

Over a period of many years this Government has been seriously concerned by special problems engendered when naturalized citizens return for a long period to the country of their former nationalities. It is upon this premise that the argument derives that Congress, through its power over foreign relations, has the power to deprive such citizen of his or her citizenship.

Other nations, it is said, frequently attempt to treat such persons as their own citizens, thus embroiling the United States in conflicts when it attempts to afford them protection. It is argued that expatriation is an alternative to withdrawal of diplomatic protection. It is also argued that Congress reasonably can protect against the tendency of three years' residency in a naturalized citizen's former homeland to weaken his or her allegiance to this country. The argument continues that it is not invidious discrimination for Congress to treat such naturalized citizens differently from the manner in which it treats native-born citizens and that Congress has the right to legislate with respect to the general class without regard to each factual violation. It is finally argued that Congress here, unlike the situation in *Kennedy v. Mendoza-Martinez*, 372 U.S. 164, was aiming only to regulate and not to punish, and that what Congress did had been deemed appropriate not only by this country but by many others and is in keeping with traditional American concepts of citizenship.

We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive. The only difference drawn by the Constitution is that only the "natural born" citizen is eligible to be President. Art. II, § 1.

While the rights of citizenship of the native born derive from § 1 of the Fourteenth Amendment and the rights of the naturalized citizen derive from satisfying, free of fraud, the requirements set by Congress, the latter, apart from the exception noted, "becomes a member of the society, possessing all the rights of a native citizen; and standing, in view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power

exhausts it, so far as respects the individual". *Osborn v. Bank of United States*, 9 Wheat. 738, 827. App. see *Luria v. United States*, 331 U.S. 8; *United States v. MacIntosh*, 283 U.S. 904, 924; *Kramer v. United States*, 328 U.S. 924, 936.

Views of the Justices have varied when it comes to the problem of expatriation.

There is one view that the power of Congress to take away citizenship for activities done by the citizen is nonexistent absent expatriation by the voluntary renunciation of nationality and allegiance. See *Perez v. Brownell*, 356 U.S. 44, 79 (dissenting opinion of William Black and Douglas); *Trop v. Dulles*, 356 U.S. 86 (opinion by Chief Justice Warren). That view has not yet commanded a majority of the entire Court. Hence we are faced with the large precedent and decided in *Perez v. Brownell*, cases, i. e., whether the present act violates due process. That in turn turns on the question put in the following words in *Berges*:

"Is the statute, withdrawal of citizenship, reasonably calculated to affect the end that it is within the power of Congress to achieve, the avoidance of embarrassment in the conduct of our foreign relations." 77, 256 U.S. at 80.

In that case, where an American citizen voted in a foreign election, the answer was in the affirmative. In the present case the question is whether the same answer should be given merely because the naturalized citizen lived in her former homeland for three years. We think not.

Speaking of the provision in the Nationality Act of 1940 which was the predecessor of § 352(a)(1), Chairman Dickstein of the House said that the bill would "relieve this country of the responsibility of those who reside in foreign lands and only claim citizenship when it serves their purpose." 86 Cong. Rep. 1164. And the Senate Report on the 1940 bill stated:

"These provisions for loss of nationality by residence abroad greatly lessen the loss of the United States in protecting through the Department of State nominal citizens of this country who are abroad but whose real interests, as shown by the conditions of their foreign stay, are not in this country." S. Rep. No. 2150, 76th Cong., 2d Sess., p. 4.

As stated by Judge Fahy, dissenting below, "this legislation, touching as it does on the 'most precious right' of citizenship (*Kennedy v. Mendoza-Martinez*, 372 U.S. at 159), would have to be justified under the Federal legislative power "by some more urgent public necessity than substituting administrative convenience for the individual right of which the citizen is deprived." 372 F. Supp. 302, 320.

In *Kennedy v. Mendoza-Martinez*, where a divided Court held that it was beyond the power of Congress to deprive an American of his citizenship automatically and without any prior judicial or administrative proceedings, he left the United States, and was

* For other aspects of the case see 372 U.S. 304.